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IN THE

# Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania, and CHABAD,

*Petitioners.*

*vs.*

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE COUNCIL ON RELIGIOUS FREEDOM, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether the display during the December holiday season of an unadorned creche at a prominent location inside the Allegheny County Courthouse, which houses the County's executive officers, its commissioner, controller, treasurer and sheriff, in addition to some of its criminal and civil courts, violates the Establishment Clause of the First Amendment of the United States Constitution.

2. Whether the display of an unadorned menorah at a prominent location on the outside steps of the City-County Building, which houses the offices and chambers of the Mayor and City Council, its treasurer, marriage license bureau, register of wills and county prothonotary (clerk), as well as the principal county courts, the Supreme and Superior Courts, violates the Establishment Clause of the First Amendment of the United States Constitution.

## STATEMENT OF INTEREST

The American Jewish Committee ("AJC"), the National Council of the Churches of Christ in the U.S.A. (the "National Council of Churches"), the Union of American Hebrew Congregations ("UAHC"), the Council on Religious Freedom, and Americans United for Separation of Church and State, as amici curiae, respectfully submit this brief in support of respondents, requesting affirmance of the decision below.

The AJC, a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and religious liberties of American Jews. These rights and liberties, however, can only be secure for Jews when they are equally secure for Americans of all other faiths. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty for all and has proved of inestimable value to the free exercise of religion in a pluralistic society.

In the view of the AJC, government display of a creche or menorah or comparable religious symbols at the seat of government represents official endorsement or sponsorship of a relig-

ious message that other sects do not accept and reflects invidiously on those non-participating sects' religious beliefs and on their adherents' status in the political community. A creche, which depicts the birth of Jesus as the birth of a divinity, is unmistakably and unalterably religious, indeed doctrinal in nature. Similarly, a menorah is a religious symbol, ceremonially used to fulfill a religious obligation in observance of a Jewish holiday. The placement of a creche on the Grand Staircase of the Allegheny County Courthouse and of a menorah on the front steps of the Pittsburgh City-County Building, not as part of some more secular or commercial display, but for the purpose of promoting their religious themes, is tantamount to state acceptance of particular religious doctrines in violation of the Establishment Clause of the First Amendment of the United States Constitution.

The National Council of Churches is the cooperative agency of thirty-one national religious bodies in the United States having an aggregate membership of more than 40,000,000. The Council does not presume to speak for all of those adherents but for its Governing Board, the body of some 280 members appointed by the several member denominations in proportion to their size and their support of the Council.

In the view of the National Council of Churches, government acceptance of a creche on public property not only secularizes and degrades a sacred symbol of Christianity, but also represents either a presumptuous identification by government with that religion and its symbols or an equally presumptuous identification by Christians of their religious traditions with the institutions of government.

The UAHC is the central body of 840 Reform synagogues in the United States and Canada. Its membership combines more that 1,250,000 Jewish persons. Through its Commission on Social Action, it represents also the Central Conference of American Rabbis, which comprises the Reform rabbinate, as well as all affiliated bodies of Reform Judaism. From its inception in 1873, the UAHC has vigorously opposed all intrusions upon the constitutional principle of separation of church and state.



The Council on Religious Freedom is a nonprofit corporation which was formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include taking action to eliminate the unnecessary entanglement of religion and state and other areas of concern which interfere with the full experience of religious freedom. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, and who recognize the importance of preserving and promoting the constitutional principle of the free exercise of religion and opposing any official endorsement of particular religious doctrines in contravention of the Establishment Clause of the First Amendment.

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution. This group has a membership of some 40,000 members of various religious beliefs and some of no religious belief in all states of the United States. It is involved in extensive litigation of First Amendment religious freedom issues throughout the nation, including such major Free Exercise and Establishment Clause cases as *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Grand Rapids School District* v. *Ball*, 473 U.S. 373 (1985); and *Edwards* v. *Aguillard*, 482 U.S. ___, 107 S.Ct. 2573 (1987).

*Amici* believe that religion has been, is, and must continue to be, a vital, vigorous and legitimate element in American public life; but that should be effected, not by state action, but by citizen action within the private sphere. There are many ways in which citizens, individually and in voluntary private groups of their own choosing, can express their religious views, commitments, symbols and aspirations without employing or seeking to employ the machinery and passive sponsorship of the state for their free exercise of religion. Government display of unadorned religious symbols at the very seat of government is a departure from that guiding principle and a violation of the Establishment Clause of the First Amendment.

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*Petitioners,*

vs.

AMERICAN CIVIL LIBERTIES UNION
GREATER PITTSBURGH CHAPTER, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE COUNCIL ON RELIGIOUS FREEDOM, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted with the consent of the parties.

### Statement of the Case

*Amici* adopt and incorporate by reference the Counter-Statement of the Case set forth in respondents' Brief in Opposition to petitioners' Petition for a Writ of Certiorari. The opinion of the court of appeals is reported at 842 F.2d 655. The rulings of the district court are unreported.

### Summary of Argument

This Court has frequently acknowledged that our Establishment Clause jurisprudence is comprised of a melange of compli-

cated holdings that, at times, perplex governmental officials seeking guidance in the performance of their duties. Two justices have even suggested that this jurisprudence is "embarrassing." *See, e.g., Edwards* v. *Aguillard*, 482 U.S.___, 107 S.Ct. 2573, 2607 (1987) (Scalia, J., dissenting, joined by Rehnquist, C.J.). Although many decisions have been fractured, with slim majorities themselves affected by concurrences, one basic proposition that unifies the Court is that "no fixed, *per se* rule can be framed for every Establishment Clause case." *Lynch* v. *Donnelly*, 465 U.S. 668, 678 (1984); *see also Lynch*, 465 U.S. at 694 (O'Connor, J., concurring) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion"); *Lynch*, 465 U.S. at 696 n.2 (Brennan, J., dissenting, joined by Marshall, Blackmun and Stevens, JJ.) (agreeing that "no single formula can ever fully capture the analysis that may be necessary to resolve difficult Establishment Clause problems").

The case at bar presents still another twist on the "creche dilemma" that was before this Court several years ago, and that has, to this day, continued to plague officials and jurists throughout the country. In this matter, the religious symbols displayed—a creche and a menorah—were located, not in a private park open to the public (as in Pawtucket), but at the very seat of Government (County Courthouse and Municipal Building). The Third Circuit Court of Appeals thus acted well within its jurisdiction in applying the analysis of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), as amplified through *Lynch*, to find that the religious displays erected by the County of Allegheny (the "County") and the City of Pittsburgh (the "City") conflict with the Establishment Clause of the First Amendment to the United States Constitution. In reaching its conclusion that the City and County impermissibly acted to advance religion (in violation of the second prong of the *Lemon* test), the court of appeals appropriately examined the salient factual differences between this case and *Lynch*, fulfilling the directive of this Court that each case be viewed in its own setting.

First, unlike the display in *Lynch*, "[e]ach display [here] was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it." 842 F.2d at 662. Further,



both government buildings at issue herein house courtrooms, compelling attendance at the displays by many people who might otherwise choose to avoid them.

Second, the creche and menorah at issue here were not subsumed by a larger display of secular items. Thus, unlike the display in *Lynch*, the religious significance of those sectarian symbols is not negated by their context and the message the City and County necessarily communicate is, at least, one of implicit endorsement of Christianity and Judaism. Irrespective of the government's actual purpose, such public perception of government endorsement of particular sects requires the invalidation of that government practice. *Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring).

Equal access for the symbols of other faiths is not a solution to that dilemma. "Separation [of church and state] is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 227 (1948) (opinion of Frankfurter, J.). Notions of accommodation of religion are not properly implicated where, as here, neither inclusion of a creche by the County in its holiday display nor inclusion of a menorah in the City's display is necessary to accommodate religious expression. There is simply no religious need to display religious symbols of any faith in government buildings.

Finally, as an alternative to the "line-drawing" analysis arguably necessitated by *Lynch*, *amici* respectfully suggest that the rationale of that decision be reexamined. Prior Establishment Clause cases, while recognizing the role that religion plays in American life, and approving references to, and accommodation of, religion, nonetheless did so in a "non-denominational" manner. In allowing students to be released from public school for religious training, neither government nor this Court was asked to ordain that a particular religion be accorded special treatment. *Zorach* v. *Clauson*, 343 U.S. 306 (1952).

In *Lynch*, however, the Court broke with established precedent by allowing state sanction of a particular religion's sacred symbol, the creche. Here, this Court is being asked to overturn the decision below and now sanction the placement of two groups' religious symbols—Christianity's creche and Judaism's

menorah—at the heart of the City and County government center. If any one precept emerges from the welter of decisions before us, it is that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Because the effect of *Lynch* is to produce just that result, the decision should be overruled.

## ARGUMENT

### I

### THE COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY HELD THAT IN PERMITTING THE PLACEMENT OF THE CRECHE AND MENORAH, THE CITY AND COUNTY HAVE IMPROPERLY ADVANCED OR ENDORSED RELIGION IN CONTRAVENTION OF THE SECOND PRONG OF THE LEMON TEST

#### A. The Court of Appeals Properly Examined the Challenged Placement of Religious Symbols Under the Lemon Test

There can be no question, and the Third Circuit Court of Appeals did not dispute, that "the starting point of our analysis should be *Lynch* v. *Donnelly*." 842 F.2d at 659. However, as recognized by the court of appeals, that decision was rendered by a "sharply divided" Court, *id*., and "has by no means put to rest issues involving use of religious decorations at the Christmas season nor has it foreshadowed any abandonment of the *Lemon* test which the Supreme Court continues to employ." *Id*. at 660 (citations omitted).[1] Accordingly, the court of appeals carefully examined the creche and menorah at issue here and applied the three-pronged test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the same test used by this Court in *Lynch*.

In applying that test, it first found that the second prong of the *Lemon* test is the one most readily violated, "as a public entity usually is able to articulate some secular purpose for a display

[1] The court of appeals also noted that "probably because the opinion [in *Lynch*] was tied so closely to the facts involved and because of the nature of the issues, there has been considerable post-*Lynch* litigation with the judges as well as the litigants at odds." 842 F.2d. at 660.



(first prong) and the mere placement and storage of a display will involve little entanglement (third prong) of government and religion." 842 F.2d at 661-62. Since "the impact of the display must be judged objectively," however, "the use of a religious symbol in a display on public property or by a public entity may well be deemed an endorsement of religion regardless of an entity's stated reasons for its placement. . . ." 842 F.2d at 662.

With respect to the second prong, the court held that six variables should be considered in deciding whether a display has the effect of advancing or endorsing religion:

> (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display.

*Id*. Having considered these criteria, the court of appeals concluded that "by permitting the creche and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion." *Id*.

Appellants, as well as the dissenting judge in the court of appeals, take issue with the majority's (and various other circuit courts') post-*Lynch* examination of seasonal creche displays under the *Lemon* test. *See, e.g.*, Brief of Petitioner, County of Allegheny ("County Br.") at 12-13; Brief for the United States as *Amici Curiae* Supporting Petitioner ("U.S. Br.") at 5; *see also ACLU* v. *County of Allegheny*, 842 F.2d at 669 (Weis, J., dissenting). However, notwithstanding this Court's admonition in *Lynch* that "[w]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area," 465 U.S. at 679, it was the *Lemon* test that this Court applied in *Lynch*. *See Lynch*, 465 U.S. at 679-85. Moreover, this Court has continued to endorse the use of that test, whatever its limitations. *See Bowen* v. *Kendrick*, __ U.S. __, 108 S.Ct. 2562 (1988); *Edwards* v. *Aguillard*, 482 U.S. __, 107 S.Ct. 2573, 2576-78 (1987); *Wallace* v. *Jaffree*, 472 U.S. 38, 55-61 (1985).

Further, this Court never explicitly held that its decision in *Lynch* was intended to end for all time questions concerning the constitutionality of creche displays during the Christmas season. In fact, much of the language of the opinion, as well as the fact-specific nature of these cases, suggest the opposite.[2] Hence, there is no merit in the suggestion by appellants or the Solicitor General that the court of appeals should not have "proceeded to make its own application of the three-prong test of *Lemon* v. *Kurtzman* to the facts of this case." (U.S. Br. at 5.)

**B. The Placement of the Creche and Menorah at Seats of Government Distinguishes this Case from Lynch**

In reaching its conclusion that the City and County acted to advance religion, the court of appeals distinguished *Lynch* in a number of respects. First, it noted that here, unlike the display in *Lynch*, "[e]ach display was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it." 842 F.2d at 662. In fact, the County Courthouse in which the creche was displayed houses the County's executive officers, its commissioner, controller, treasurer and sheriff, as well as some of its criminal and civil courts. The City-County Building, on the front steps of which the menorah was placed, houses the offices and chambers of the Mayor and City Council, the office of the City Treasurer, the County Prothonotary (Clerk), the marriage license bureau and the Register of Wills, as well as the principal county civil trial courts, the Supreme and Superior Courts.

While appellants argue that *Lynch* was not intended to be given a narrow application dependent on the physical location of a display (Brief of Petitioner, City of Pittsburgh ("City Br.") at 17; County Br. at 21-23; *see also* U .S. Br. at 8, 14), there is ample authority in the opinion itself for the opposite conclusion. *See, e.g.*, 465 U.S. at 671; 465 U.S at 692-93 (O'Connor, J., concurring)

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[2] *See, e.g., Lynch*, 465 U.S. at 678 ("in each case, the inquiry calls for line drawing: no fixed, *per se* rule can be framed"); 465 U.S. at 686 ("[t]he presence of the creche *in this display* [does not] violate[ ] the Establishment Clause . . ."); 465 U.S. at 692, 694 (O'Connor, J., concurring) (referring to the "government's display of the creche *in this particular physical setting*" and stating that "[e]very government practice must be judged *in its unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion") (emphasis added).



("These features combine to make the government's display of the creche *in this particular physical setting* no more an endorsement of religion than [other] governmental 'acknowledgments' of religion [upheld by the Court]") (emphasis added). *See also* 465 U.S. at 695 (Brennan, J., dissenting) ("[t]he Court reaches an essentially narrow result which turns largely upon the particular holiday context in which the City of Pawtucket's nativity scene appeared").

Moreover, the distinction among religious symbols, as to their acceptability, dependent upon whether they are located on private property, public parks or government buildings, is clearly supported by earlier Supreme Court precedent. In *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), this Court held that religious teachers employed by private religious groups could not, consistent with the Establishment Clause, come into public school buildings during school hours to provide religious instruction. This Court stated:

> Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State.

333 U.S. at 212.

In contrast, this Court upheld in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), the release of school children from the public schools in order to obtain religious instruction provided on *private* property. This Court stated:

> This "released time" program involves neither religious instruction in public school classrooms nor the expenditure of public funds. . . . The case is therefore unlike *McCollum* v. *Board of Education* [citation omitted] which involved a "released time"program from Illinois. In that case the *classrooms* were turned over to religious instructors. We accordingly held that the program violated the First Amendment. . . .

*Id.* at 308-09 (emphasis added); *see also* 343 U.S. at 316 (Black, J., dissenting) ("I see no significant difference between the invalid

Illinois system and that of New York here sustained[ ] [e]*xcept for the use of the school buildings in Illinois* . . . "](emphasis added).

Obviously, then, the public/private land distinction advanced here and adopted by the court of appeals herein (as well as by the Sixth Circuit in *ACLU* v. *City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986); and by the Seventh Circuit in *American Jewish Congress* v. *City of Chicago;* 827 F.2d 120 (7th Cir. 1987)) does not, as suggested by the County, "require this Court to give special significance to a factor treated as essentially irrelevant in prior cases." (County Br. at 26).

Nor is there any merit to the argument of the Solicitor General that the "effect of the display . . . [is] the same regardless of location" (U.S. Br. at 8, 15). Indeed, placement of religious symbols such as the creche and menorah at the seat of government, rather than on private or even mere public park land,[3] results all the more markedly in the government's "imprimatur of approval" being placed on the particular religious beliefs exemplified by the symbols. *Cf. Lynch*, 465 U.S. at 702 (Brennan, J., dissenting). As stated by the Court of Appeals for the Seventh Circuit in *American Jewish Congress* v. *City of Chicago*, 827 F.2d at 128:

> The presence of the government in Chicago's City Hall is unavoidable. The building is devoted to government functions: for example, both city and county government offices are located there, and the City Council holds its meetings there. Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably

[3] After all, public park land or "commons" have been used for religious meetings and observance since time immemorial, subject only to reasonable regulation as to time, place and manner. *See, e.g., Hague* v. *CIO*, 307 U.S. 496, 515 (1939); *Heffron* v. *Internat'l Soc. for Krishna Consciousness*, 452 U.S. 640 (1981). The crucial distinction between a traditional public forum, like a park, and the seat of government is suggested by *Widmar* v. *Vincent*, 454 U.S. 263 (1981), a case central to Chabad's argument for inclusion of a menorah in the City's holiday display. *See* Brief for Petitioner Chabad ("Chabad Br.") at 24, 30-31. In *Widmar*, this Court held that a state university, which makes its facilities generally available for the activities of registered student groups, may not close its facilities to a registered student group desiring to use the facilities for religious

*(footnote continued on next page)*



> creates a clear and strong impression that the local government tacitly endorses Christianity.
>
> The message of endorsement is equally powerful on the symbolic level. Like the nativity scene itself, City Hall is a symbol—a symbol of government power. The very phrase "City Hall" is commonly used as a metaphor for government. A creche in City Hall thus brings together Church and State in a manner that unmistakably suggests their alliance. The display at issue in this case advanced religion by sending a message to the people of Chicago that the city approved of Christianity.

Additionally, since both government buildings at issue herein contain courtrooms and offices for essential city and

*(footnote continued from previous page)*

worship and discussion. The Court, in applying the second prong of the *Lemon* test, stated:

> First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. . . . Second, the forum is available to a broad class of nonreligious as well as religious speakers. . . . The provision of benefits to so broad a spectrum of groups is an important index of secular effect.

454 U.S. at 274; 454 U.S. at 280-281 (Stevens, J., concurring in judgment) ("the record discloses no danger that the University will appear to sponsor any particular religion").

In contrast, and unlike the public park at issue in *McCreary* v. *Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by equally divided court sub nom., Bd. of Trustees of Village of Scarsdale* v. *McCreary*, 471 U.S. 83 (1985), the Allegheny County Courthouse, and the Grand Staircase in particular, is not an open public forum or traditional marketplace of ideas. *See Widmar*, 454 U.S. at 271 n.10 ("It is the avowed purpose of [the university] to provide a forum in which students can exchange ideas.") In addition, the duration of the display, its size, and permanence all serve to distinguish the creche and menorah from an instance of transitory speech tolerated by the state, as in *Widmar*, and make it more akin to the imposition of official doctrine endorsed by the state. Notably, although some art and culture displays are exhibited in the County Courthouse during the year, according to the Director of the Bureau of Cultural Programs, no displays other than the creche had appeared on the Grand Staircase—the most beautiful and focal point of the building's interior—during her tenure. Joint Appendix ("J.A.") 201-04.

Where religious groups dominate even an open forum, the advancement of religion becomes the forum's unconstitutional primary effect. *Widmar*, 454 U.S. at 275. Where the forum is a building devoted exclusively to the administration of the law and government, as here, the impermissible effect of the religious display is that much greater.

county services, bringing a good many people into contact with the City's and County's displays who might otherwise choose to avoid them (*see* J.A. 110-12, 124-25), there is the same element of compulsion here as was found to invalidate the "released time" program in *McCollum*, 333 U.S. at 212.[4] Accordingly, the court of appeals correctly held that the placement of the creche and menorah at prominent sites at "public building[s] devoted to core functions of government" was a significant factor distinguishing this case from *Lynch* v. *Donnelly*. 842 F.2d at 662.

### C. The Fact that the Creche and Menorah Here Were Unadorned and Not Part of Some Larger, Secular Display, Distinguishes this Case from Lynch

The court of appeals also distinguished *Lynch* on the ground that the creche and menorah at issue here could not "reasonably be deemed to have been subsumed by a larger display of non-religious items," 842 F.2d at 662, while the Pawtucket creche was part of a Christmas display including, *inter alia*, a Santa Claus house, reindeer pulling Santa's sleigh, a cut-out clown, a Christmas tree, and a talking wishing well (*Lynch*, 465 U.S. at 671). *See also ACLU* v. *City of Birmingham*, 791 F.2d at 1566 (prohibiting display of "unadorned creche" not "surrounded by a multitude of secular symbols of Christmas").

This is a legitimate basis for distinction, insofar as the message of "endorsement" of the clear religious significance of the creche—acknowledged by this Court in *Lynch* [5]—is not so easily "negated" (465 U.S. at 692 (O'Connor, J., concurring)) when the "overall holiday setting" (*id.*), as at the County Courthouse, includes only the creche itself.[6] Since the menorah placed on the steps of the City-County Building was similarly "unadorned" by non-religious items which might have combined to "negate" the message that the City of Pittsburgh endorses Judaism or the Judeo-Christian religions,[7] the court of appeals' conclusion that the menorah was distinguishable from the display upheld in *Lynch* was also proper.

[4] This Court stated in *McCollum* that "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." 333 U.S. at 231 (opinion of Frankfurter, J.). The same can certainly be said for City Hall and the courts in our country.

[5] *See, e.g., Lynch*, 465 U.S. at 680-81, 685-88; *see also* 465 U.S. at 692 (O'Connor, J., concurring) ("the religious and indeed sectarian significance of the creche . . . is not neutralized by the setting . . . ); 465 U.S at 711 (Brennan, J., dissenting) ("The essence of the creche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His Son into the world to be a Messiah"); 465 U.S. at 727 (Blackmun, J., dissenting) (referring to the creche as a "sacred symbol").



Appellants and the United States all argue vigorously that a rule of law that depends on "marginal differences in holiday displays" (U.S. Br. at 17) like the existence of a "cut-out clown, reindeer, or talking wishing well" (*id.*), is ill-advised. Similarly, the dissenting judges in *American Jewish Congress* v. *Chicago*, 827 F.2d at 130 (Easterbrook, J., dissenting), and *ACLU* v. *City of Birmingham*, 791 F.2d at 1569 (Nelson, J., dissenting), argue that it is "appalling" for the courts to mandate "how much paganism" is required in holiday displays in order for them to pass constitutional muster. While admiring the eloquence of these statements, we are unsympathetic to the position embodied in them.

First, distinctions based on such differences in displays only become significant when they are not "marginal." Thus, questions concerning whether a display contains two reindeer or three, or a candy cane, a reindeer and a Santa Claus, will not, as feared by the County, "artificially elevate[ ] trifling details about the particulars of a municipal display into matters of high and vital con-

[6] The Solicitor General's attempt to persuade this Court that the red and white poinsettia plants which surround the creche here at issue are in some way equivalent to the secular objects adorning the Pawtucket creche, is wholly without merit. Indeed, an examination of the photographs of the creche (Joint Exhibit Volume ("J.E.") 6-8) reveals that, if those plants have any impact on the display at all, it is to draw one's attention all the more to the nativity scene. Such floral settings, moreover, are commonly used in Catholic church creche displays. (J.A.78). Thus, the poinsettias certainly cannot be equated, in terms of "chang[ing] what viewers may fairly understand to be the purpose of the display" (*Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)), with a typical museum setting.

[7] The placement of the menorah next to the Christmas tree does not accomplish this "negation." The Christmas tree is, for present purposes, considered a secular symbol of Christmas. Its placement next to the menorah—in our view a religious symbol of Chanukah (*see* discussion, *infra*, at subsection D)—if anything, emphasizes the independent significance of each as representing separate and distinct holidays, and cannot be said to negate the endorsement inherent in the display of the menorah.

stitutional importance" (County Br. at 18). Rather, only questions concerning whether a display contains a religious symbol as the most prominent or only item, as would the display of a creche or menorah standing alone, or whether, conversely, it contains both religious and non-religious symbols, need be passed upon.

Second, the importance of distinctions based on content is suggested by this Court's analysis in *Lynch*. This Court not only described the secular contents of the display, 465 U.S. at 671, but went further and described the impact of the display on the community. This Court stated, "the display brings people into the central city, and serves commercial interests and benefits merchants and their employees. . . ." 465 U.S. at 685. While the Court's point, in the cited statement, was that the religious character of the display was not thereby undermined, it is still significant that none of the same commercial interests is served here.

Moreover, even if the particular content of the Pawtucket display, *i.e.*, the fact that it contained non religious symbols, was not intended by the majority of this Court to form the basis for the *Lynch* holding, such a limitation is necessary in order to preserve the integrity of that decision's reasoning. As expressed by the Seventh Circuit Court of Appeals in *ACLU* v. *City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986), which considered the nativity scene a "mixed case:"

> The Nativity scene is an unmistakable reminder of the holiday's religious origins. Yet it does not follow that its inclusion in a Christmas display lacks secular purpose, or that its predominant effect is to promote Christianity. *See Lynch* v. *Donnelly, supra*, 465 U.S. at 680-82. As Justice O'Connor explained in her concurring opinion in *Lynch*, once it is conceded that the government can celebrate Christmas as a public holiday,despite its religious origins and continued religious significance to believing Christians, the inclusion of the Nativity scene in the celebration is seen to serve a secular purpose—"celebration of a public holiday with traditional symbols," *id.* 465 U.S. at 693, 104 S.Ct. at 1369—and therefore "cannot fairly be understood to convey a message of government endorsement of religion." *Id.* One may question whether the second proposition follows from the first; the purpose could be secular, but the dominant effect to promote Christianity. Yet maybe not, *where as in the Lynch case the Nativity scene is mixed in with the other traditional symbols of Christmas, most of which either never had or have lost their Christian connotations.*



794 F.2d at 272 (emphasis added). In that court's view, with which we concur, the foundation of the *Lynch* decision—that the celebration of a public holiday (even one with religious origins) with traditional symbols will not be understood as conveying a message of endorsement—fails when the only "traditional symbol" displayed is one with such a strong Christian connotation. Finally, to the extent that an examination of displays on a case-by-case basis is required, such a result is mandated by the *Lynch* decision itself. *Lynch* did not determine for all time that all nativity scenes are permissible when displayed in the month of December, much less that all Christmas or all religious symbols are so permissible. Then Chief Justice Burger, writing for the majority, stated: "In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause . . . erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'" 465 U.S. at 679. Chief Justice Burger also framed the issue before the Court as whether "the presence of the creche in *this display* violates the Establishment Clause. . . ." *Id.* at 686 (emphasis added).

Thus, the Court took on the responsibility for determining, on an individual basis, whether the effect of the symbol or display at issue is to promote the religion it represents. The instant case, in which the County of Allegheny argues that its creche and the City of Pittsburgh argues that its menorah—both of which appear in radically different contexts than the creche upheld in *Lynch*—do not have such an effect, is a perfect example. Accordingly, the criticism advanced by appellants, that the need for a case-by-case analysis negates a distinction based on content, is misplaced.

### D. The Court of Appeals Correctly Held That the Creche and the Menorah Are Associated With Religious Holidays and Would Be Viewed As Pertaining to a Particular Religion

In reaching its conclusion that by permitting the display of the creche and menorah, the City and County had tacitly en-

dorsed Christianity and Judaism, the court of appeals found that "both the creche and the menorah are associated with religious holidays and would be viewed as pertaining to a particular religion." 842 F.2d at 662. With respect to the creche, there can be little doubt about its religious significance. As recognized by this Court in *Lynch*, the creche, even when surrounded by other, secular symbols of Christmas, remains a religious symbol. Indeed, it is difficult to imagine a symbol which more quintessentially embodies the doctrine underlying the Christian faith itself than the creche—which celebrates, in adorational terms—the birth of Jesus as the Son of God.

With respect to the menorah, however, Chabad, which represents a small segment of the Jewish community known as the Lubavitch (*see* J.A. 247, 250-53), takes a different view. Presumably in an attempt to have the placement of the menorah deemed constitutional even in the event that this Court adopts the position advanced here—that a creche, *standing alone*, as opposed to one surrounded by secular symbols, will not pass constitutional muster because of its clear, "unnegated" religious significance—and perhaps even in the event that this Court reconsiders its decision in *Lynch* and holds that a municipality may not display a creche of any kind (*see* Point III, *infra*), Chabad argues that the menorah is not a religious symbol.[8] Specifically, it argues that the menorah "symbolizes not only a particular religious observance

[8] We presume that this is Chabad's motive because, simply stated, we can imagine no other reason why a fundamentalist group like Chabad would resort to taking a position so contrary to its own basic tenets, and so offensive to other Jews. Since Chabad has not contested the viability of the *Lynch* decision, as we do (*see* Point III), and since that decision would presumably protect a municipality's display of any similarity adorned holiday display, at least as long, one supposes, as the symbol were not *more* religious than a creche (*cf. ACLU* v. *City of St. Charles*, 794 F.2d 265), then we can understand Chabad's desire to publicize that the menorah is not *as religious* a symbol as the creche. But the only conceivable explanation for their going further, and claiming that the menorah has no religious significance at all, is that they are attempting to remove that symbol completely from the *Lynch* domain, and equate it instead with a symbol which appears not to need judicial approval, *i.e.*, the Christmas tree. We respectfully suggest that Chabad's position, however creative, is disingenuous, at best.

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unique to Judaism, but also cultural and national aspirations, as well as universal human values."[9] We strongly disagree.

First, notwithstanding Chabad's attempt to equate a menorah with a Christmas tree (J.A. 44), the menorah is not and never has been a "holiday decoration" which must have its place with the others of the season. The menorah is associated with Chanukah, a religious holiday commemorating the rededication in 165 B.C. of the second Holy Temple, after recapturing it from the Syrian Greeks.[10] The word "Chanukah," in fact, means "rededication." This holiday, while perhaps not the most important on the Jewish calendar, is still significant enough that, during its observance, pursuant to religious law, adherence to certain religious customs and commandments reflecting sadness—such as delivering public eulogies—ceases and the Hallel, a prayer marking Jewish festivals, is recited. *A Maimonides Reader*, 118-19 (Twersky, ed. 1972).

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In this regard, we also note the flaw in the City of Pittsburgh's criticism of the court of appeals' position on the menorah. The City states: "If a creche which depicts a central religious event of this country's dominant religion does not advance religion and violate the Establishment Clause, a Chanukah menorah, which is both a religious and cultural symbol of a minority religion's feast commemorating a battle, cannot advance religion and violate the Establishment Clause" (City Br. at 15). However, the court of appeals did not hold, and neither we nor respondents argue herein, that the creche is constitutional while the menorah is not; on the contrary, we are in agreement with the court of appeals that neither is permitted under the Establishment Clause. Conversely, in those contexts where, under *Lynch*, a creche would be permissible (however unwisely), a menorah would be permissible as well.

[9] Chabad even accepts—indeed, advances—the finding of the district court that the menorah "has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men'" (Chabad Br. at 30.).

[10] Rabbi Mordecai M. Kaplan, one of the preeminent Jewish scholars of the 20th century and founder of the Reconstructionist branch of Judaism has noted that:

> The striking feature of the celebration of Hanukkah is the fact that, although the occasion which it commemorates was incidental to a successful war of independence fought against an oppressive foreign ruler, that occasion itself was neither a victory on the field of battle nor a political transaction that gave official recognition to the hard-won independence of Judaea. Hanukkah commemorates the rededication of the Temple at Jerusalem to the God of Israel after it had been deliberately defiled by the Grecian rulers.

M. Kaplan, *The Meaning of God in Modern Jewish Religion* (1937) at 330.

The menorah itself is, as explained by Rabbi Chaim Dov Keller recently in the November 1988 issue of the Agudath Israel's publication The *Jewish Observer*:

> a *cheftza shel mitzva*—an article used for a *mitzva* [good deed ordained by religious law]. When we perform the *mitzva* as the *halacha* [religious law] requires, then we have brought about a *pirsumei nisa*—a proclamation of a Divine miracle. This is the will of the Almighty—that we perform the *mitzva* as our Sages prescribed.

Keller, *Letter to the Editor*, Jewish Observer, Nov. 1988 at 39. In accordance with this religious purpose, as the record below reflects, during Chanukah, Jews are obligated to light a menorah nightly, accompanied by the recitation of prayers. The English translation of the traditional Hebrew Chanukah blessing recited at the City-County menorah lighting was: "We are blessing God who has sanctified us and commanded us with mitzvot and has told us to light the candles of Hanukkah." J.A. 306.

Chabad's own witness admitted on cross-examination that displaying and lighting the Chanukah menorah outside the home is in fulfilment of the command of the *Shulchan Aruch*, the Code of Jewish Law, "*pirsumay nissah*"—"mak[e] public the miracle." (J.A. 266-71).[11] Thus, notwithstanding Chabad's attempt to persuade the Court that this lighting "does not constitute a 'religious' act," *see* Declaration of Rabbi Yisroel Rosenfield (J.A. 43), it is clear that the lighting of the menorah is an integral part of the observance of Chanukah and the effect of such lighting, and of the menorah itself, is to "send a message . . . to adherents [of the Jewish faith] that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

In sum, a menorah may not be a "sacred object" in the same sense as a Torah Scroll, but Chabad simply goes too far in insisting that the menorah "is not an inherently religious object" and that it has "no religious significance whatever" (Chabad Br. at

[11] The Shulchan Aruch was compiled by Yosef Caro, a Talmudic scholar, in the mid-sixteenth century and is considered an authoritative text. *See* J.A. 256. *See also Babylonian Talmud*, Tractate "Sabbath" 21b-22a (Rashi, the preeminant commentator on the Talmud, the authoritative work of halachic Jewish tradition, points out that the menorah, at Chanukah, is to be openly displayed, to enhance public recognition of the miracle that was wrought).



25). While a menorah may, as Chabad claims, not be analogous to a creche—which symbolizes the central underpinnings of Christianity itself—it is the central religious symbol of Chanukah. As correctly held by the court of appeals, "the general public would [not] be aware of the religious fine point made by Chabad and thus [would not] view the display of the menorah as a lesser endorsement of religion than that of a Torah Scroll or other object regarded as sacred." 842 F.2d at 662.

At a minimum we would urge this Court to affirm the court of appeals' holding that "regardless of the lack of religious significance of a menorah its sectarian character is clear and thus even though it may not be regarded as a sacred object its placement was an endorsement of religion." *Id.*

### E. The Placement of the Creche and Menorah in this Case Convey A Message of Endorsement of Religion Within the Meaning of Justice O'Connor's Concurrence In *Lynch*

Distinguishing the creche and menorah at issue here from the Pawtucket holiday display upheld in *Lynch* is consistent with Justice O'Connor's concurring opinion in that case. In that opinion, Justice O'Connor suggested an approach which examined whether government conduct "endorsed" or "disapproved" of religion:

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

465 U.S. at 692.

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

*Id.* at 688.

With respect to the creche at issue in *Lynch*, Justice O'Connor determined that "although the religious and indeed, sectarian

significance of the creche . . . is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 692.

The differences between the displays at issue here and the one involved in *Lynch*, however, are differences which significantly influence the "effect" of such displays on the average observer who is not an adherent of the represented faiths. Both the lack of secular symbols adorning the displays at issue here and their placement on government headquarters differentiate this case from *Lynch*, insofar as they severely undermine the extent to which the religious significance of the displays is "negated."

As stated by the Seventh Circuit Court of Appeals in *ACLU* v. *City of St. Charles*, 794 F.2d at 271, "the more sectarian the display, the closer it is to the original targets of the [Establishment] clause, so the more strictly is the clause applied." Where, as here, the displays are unadorned by non-religious objects which could, if present, combine to "change[ ] what viewers may fairly understand to be the purpose of the display," *Lynch*, 465 U. S. at 692, and where, as here, they are placed at the very seat of government—indeed, at extremely prominent, even prime, locations at those government buildings[12]—there is simply no barrier of the kind found in *Lynch* to the government's communication of a message of endorsement of religion. The result, inescapably, is that adherents of the faiths represented by the creche and menorah—Christians and Jews—will receive a message that "they are insiders, favored members of the political community," and that non-adherents will receive "the opposite message." *Id.* at 688.[13]

[12] J.A. 176, 185-86, 206-07.

[13] The record in this case clearly supports this conclusion. Howard Elbling, a lawyer and clerk to a Common Pleas Judge, regularly was required to appear at the Allegheny County Courthouse in order to perform duties of his clerkship and

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Equal access for the symbols of other faiths is not an escape from this fundamental concern. "Separation [of church and state] is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." *McCollum*, 333 U.S. at 227 (opinion of Frankfurter, J.). First, while the City and the County may open their innermost precincts to the displays of all sects, not all may be willing or able to provide such displays. The record is clear that Moslems do not depict their concept of God through representational paintings, sculpture or similar displays. J.A. 110-11. Atheists, certainly, would be hard pressed to propose a symbol comparable to the creche or the menorah. Other sects, fearing the trivialization of their symbols, may decline to participate.[14] Persons belonging to those non-participating sects will be made to feel "outsiders, not full members of the political community," *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Irrespective of the government's actual purpose, such public perception of government endorsement of particular sects requires the invalidation of that government

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practice. Mr. Elbling, a Jew, testified that he had passed the creche four to six times a day, perhaps thirty to thirty-five times in all (J.A. 124), that he could not get to work by his normal route without passing it, and that each time he felt more offended (J.A. 125). The creche:

> just evoked from me a memory of middle ages time when my people were persecuted and forced to live in guettos [sic]. You know, as a, as an American, as a tax paying citizen, I don't think that I have to be reminded of that as I walk into a public building.

J.A. 125; *see also* J.A. 128.

[14] This concern has been eloquently stated by a leading Methodist clergyman:

> [Some propose] to reassert religious values by posting the Ten Commandments on every school-house wall, by erecting cardboard nativity shrines on every corner, by writing God's name on our money, and by using His Holy Name in political oratory. Is this not the ultimate in profanity.
>
> • • •
>
> What is the result of all this display of holy things in public places? Does it make the market-place more holy? Does it improve people? Does it change their character or motives? On the contrary, the sacred symbols are thereby cheapened and degraded. The effect is often that of a television commercial on a captive audience—boredom and resentment.

Kelley, *Beyond Separation of Church and State*, 5 J. Church & State, 181, 190-91 (1963). *See also Marsh* v. *Chambers*, 463 U.S. 783, 804 & n.16 (1983) (Brennan, J., dissenting).

practice. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.").

Second, the proffered "solution" of equal access for all religions to the seat of government for the display of their symbols will inevitably lead to a heightened and impermissible entanglement between religion and state. Government efforts to accommodate the demands of religious groups for inclusion of their symbols will result in tensions between religious and civil authorities and among religious groups as the issues of placement, propriety and size of display are addressed, particularly where the display space available at the house of government, as here, is not unlimited. Competing efforts for this limited resource may "occasio[n] considerable civil strife ." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 796. In addressing these administrative concerns, the government will also necessarily have to decide what constitutes a "religion," "[t]hus [creating] a governmental power to hinder certain religious beliefs by denying their character as such." *Zorach*, 343 U.S. at 318 n.4 (Black, J., dissenting).

Chabad argues for inclusion of the menorah as a symbol of "freedom of conscience and good will to all people" (Chabad Br. at 25), freed from religious connotations by its display in the context of the overall holiday setting . Yet, the religious nature of the menorah aside, to include the menorah based on the reasoning that the celebration of Chanukah each year coincides with the "Christmas holiday season" (*see* U.S. Br. at 19) is necessarily to exclude the symbols of other sects that do not celebrate year-end religious observances.

Hence the County and the City cannot physically or constitutionally "accommodate" all religions, nor are they permitted to embrace the symbols of some where the free expression of those sects' traditions and principles may find other, non-government assisted, outlets.[15]

[15] Moreover, the very notion of placing religious symbols at the seat of local government as an "accommodation" of religion is, as Point II, *infra*, will show, a misapplication of notions of "accommodation" which are associated with free exercise doctrine.



## II

## NOTIONS OF "ACCOMMODATION OF RELIGION" ARE NOT PROPERLY IMPLICATED IN THIS CASE

In a long line of cases, this Court has held that "accommodation" of government is necessary to protect an individual's right to "freely exercise" his religious beliefs consistent with the First Amendment. *E.g.*, *Sherbert* v. *Verner*, 374 U.S. 398 (1963). As stated by the Court in *Zorach*, however, "[i]t takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case." 343 U.S. at 311.

From a constitutional perspective, of course, the notion of "accommodation" is properly associated with those cases where the carrying out of a religious belief would be subject to governmental penalty, or at least to deprivation of a public benefit, if there were not some adjustment in a generally applicable rule. In such cases, government must demonstrate that the purposes served by the challenged regulation are of compelling interest and can be served by no less restrictive means before it will be allowed to refuse some such adjustment. *E.g.*, *Hobbie* v. *Unemployment Appeal Comm'n of Florida and Lawton & Co.*, 480 U.S. 136 (1987).

Neither inclusion of a creche by the County in its holiday display nor inclusion of a menorah in the City's display is necessary to accommodate individual religious expression.[16] *Lynch*, 465 U.S. at 717 (Brennan, J., dissenting). There are ample private forums away from the seat of government for the *public* display of religious symbols in recognition or celebration of the holidays with which they are associated. At those sites, the imprimatur of

[16] The "free exercise" argument advanced by *amicus curiae* Concerned Women for America in support of petitioners is thus misplaced and the authority they cite is distinguishable from the instant case. *See* Concerned Women for America's Brief at 6-9.

In *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908), this Court affirmed the constitutionality of federal payments made, pursuant to treaty, to a Native American tribe planning to use the funds for a Catholic school because to have denied them this chosen use of their own funds would have been to deny the tribe their sole opportunity to provide themselves a religious education. Here, government's refusal to display the creche or menorah would not similarly preclude the free exercise of religion.

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government is absent and the coercive effect of the display of such sectarian symbols at the seat of government is avoided.[17]

Further, even if we accept the City's and County's stated "secular" purpose, this Court has frequently held that government may not "employ religious means to reach a secular goal unless secular means are wholly unavailing." *School Dist. of Abington* v. *Schempp*, 374 U.S. 203, 294 (1963). *See also Wallace* v. *Jaffree*, 472 U.S. at 59; *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122-23; *ACLU* v. *Rabun Co. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983); *Gilfillan* v. *City of Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981). Here, the City's and County's stated purpose of marking the Christmas holiday and promoting good will could be adequately served without including a menorah or creche in their respective displays.[18]

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*Bradfield* v. *Roberts*, 175 U.S. 291 (1899), is also inapposite. There, as in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), the question presented was the extent to which the government might rely upon sectarian institutions in providing clearly secular services. Here, the issue is the use of government facilities which advance religion, albeit for ostensibly secular purposes. Notably, the sectarian symbols which might be expected to adorn the government funded hospital additions in *Bradfield* (or the college buildings in *Tilton*) were far removed from the seat of government.

[17] The availability and importance of alternative private sites for the display of sectarian symbols is illustrated by community practice in Larchmont, New York. After more than 20 years of being displayed in front of the Village Hall, the Larchmont village creche was rotated among area churches. Local Christian clergy acknowledged that many Christians as well as non-Christians felt it was "inappropriate" to exhibit a symbol of the incarnation on public property.

> The clergy declared that the manger "goes to the center of the Christian orthodoxy: that the mystery of the divine reality becomes uniquely incarnate in a human life." For this reason, they said, "the clergy hold that the creche is not a universal but a sectarian, particularistic symbol, and that its appropriate place is not on tax-supported property, but in churches or on their properties and in our homes."

Rabinove, *Religious Symbols and Gov't: What's All the Fuss?*, Long Island Jewish World, December 2-8, 1983. Nevertheless, in the wake of *Lynch*, the local government voted to reinstate the creche display on the Village Hall lawn. *Cf. McCreary* v. *Stone*, 739 F. 2d at 720 (Village of Scarsdale, prior to *Lynch*, voted to deny requests to display creche on public property).

[18] In contrast, the furtherance of public appreciation of art and literature necessitates the display of religious objects in museums and the study of relig-

*(footnote continued on next page)*



While certain government action, prompted by a secular purpose, may advance religion, such is the inevitable consequence of the broad reach of both government and religion in our society. To pass constitutional muster, however, that action must be scrupulously neutral, promoting religion generally and incidentally, rather than as a "primary effect" of the action in question which, of course, would implicate the second prong of the *Lemon* test. *See Zorach* v. *Clauson*, 343 U.S. 306 (mandatory release time from school for off-campus religious instruction). *See also Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970) (property tax exemption for religious institutions); *Tilton* v. *Richardson*, 403 U.S. 672 (construction grants for college buildings of church-sponsored institutions of higher learning combining secular and religious education).

Where permissible government practice coincides with a *particular* religious belief, the advancement, or in less precise parlance, "accommodation", of that belief is indirect and, as a practical matter, the result of government's taking into account common practice to further its secular goal. *See McGowan* v. *Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws). Indeed, government recognition of Christmas Day as a public holiday does no more than reconcile the functioning of government institutions to a *de facto* common day of family gatherings and rest. *Lynch*, 465 U.S. at 710, 714-15, (Brennan, J., dissenting). *Marsh* v. *Chambers*, repeatedly invoked by Chief Justice Burger in *Lynch*, is not to the contrary.[19] The Court specifically found in *Marsh* "no indication that the prayer opportunity ha[d] been ex-

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*(footnote continued from previous page)*

iously inspired texts in schools. *Cf. Lynch*, 465 U.S. at 676-77. "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view." *McCollum*, 333 U.S. at 236 (Jackson, J., concurring). That a creche or menorah may constitutionally be displayed in a government supported art gallery, however, does not compel the conclusion that an ostensibly secular purpose may justify their display in another mode, in another place.

[19] Significantly, in his opinion for the Court in *Marsh*, Chief Justice Burger relied upon the "unique history" of the appointment of paid legislative chaplains in upholding the constitutionality of that practice. *Marsh*, 463 U.S. at 786-92.

ploited [by the legislative chaplain] to proselytize or advance any one, or disparage any other, faith or belief." 463 U.S. at 794-95.[20]

In contrast, by providing a menorah to the City, Chabad, a fundamentalist Jewish group, seeks to further its "war against the forces of assimilation, helping Jews around the world rediscover the eternal truths of Torah Judaism." J.E. 20. Similarly, the organizational purpose of the Holy Name Society, "to promote veneration for the name of Jesus," (J.A. 73), clearly bespeaks its goal in providing a creche—a holy symbol of the Catholic faith [21]— to the County for government display. By involving themselves in the display of the menorah and the creche, respectively, at the very seat of government, the City and the County have undertaken to endorse, at least implicitly, those sectarian messages.[22] *See Stone* v. *Graham*, 449 U.S. 39, 41 (1980) ("avowed secular purpose is not [always] sufficient to avoid conflict with the First Amendment"); *Edwards* v. *Aguillard*, 107 S.Ct. at 2579 (1987) ("it is required that the [State's] statement of [secular] purpose be sincere and not a sham"). Their conduct in erecting those holiday displays does more than coincidentally harmonize with some religions; it impermissibly "aids religious groups to spread their faith." *McCollum*, 333 U.S. at 210. "The state should not be allowed to do for citizens what, in their rightful free exercise of religion, they are perfectly capable of doing for themselves." Rabinove, *The Constitution and the Creche*, Reform Judaism, Winter 1984-85 at 3.

## III

## IN LIGHT OF THE DIFFICULTIES INHERENT IN THE LYNCH ANALYSIS, THAT DECISION SHOULD BE REEXAMINED AND SET ASIDE

As demonstrated above, an affirmance of the decision of the Third Circuit Court of Appeals would be consistent with the decision in *Lynch* v. *Donnelly*. However, there are some difficulties inherent in that decision which bear reflection. One of those difficulties is that its premise—that a clearly sectarian municipal celebration of the Christmas holiday is, when viewed in the context of the season, permissible because Christmas is a national holiday (*i.e.*, a holiday with "secular aspects")—gives rise to arguments like that of the Solicitor General herein that a menorah is permissible because it "is part of the Jewish celebration of Chanukah, which falls each year within the Christmas holiday season." U.S. Br. at 9, 19. The Solicitor General cites the fact that private and governmental entities are

> accommodating and recognizing celebrations of Christmas and Chanukah together as part of a general holiday season. An objective observer would thus view Pittsburgh's decision to erect a menorah next to the Christmas tree on the steps of the City-County Building not as endorsing Judaism, but merely as recognizing another dimension of the holiday season.

*Id.* As the testimony of Howard Elbling makes clear, many people are offended "by the fact that people are trying to equate Christmas and Chanukah. The holidays have nothing to do with each other . . ." (J.A. 128).

Moreover, it is difficult to imagine that a rule of law determining the kinds of municipally displayed religious symbols which are permissible under the United States Constitution should turn on the happenstance that the holiday associated with the symbol falls within the month of December. Indeed, such a test would necessitate a decision that no other religion's symbols could permissibly be displayed, since, as far as we know, no other religious holidays fall in that month.[23]

Indeed, the premise of *Lynch*, that the status of Christmas as a national holiday sanctions governmental displays of its overtly religious symbols, is itself fraught with difficulties. In *Lynch*, this

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[20] Notably, Robert E. Palmer, the Nebraska Legislature's chaplain, did not, after 1980, offer prayers which were explicitly Christian; he characterized his prayers as "nonsectarian." *Marsh*, 463 U.S. at 793 n.14.

[21] Before the district court, Father Gregory Swiderski, a Catholic priest, testified that a nativity scene is "a Catholic sacramental, in that it is a representation of something holy," J.A. 72; it does not have any secular significance. J.A. 78, 134.

[22] The menorah at the City-County Building was lit nightly at which time a prayer invoking the name of God was recited by a rabbi. J.A. 280-81.

[23] *Cf.* Chabad Br. at 29 (arguing that no excessive entanglement with religion is required by a decision permitting the display of a menorah as long as the symbols of other non-Christian faiths are also permitted).

Court stated that the City of Pawtucket, in displaying the creche, had simply:

> taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.

465 U.S. at 680.

> Elsewhere, this Court referred to the creche as a symbol of a particular historic religious event, [ ] part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries. . . .[24]

*Id.* at 686.

To millions of American non-Christians, however, a creche does *not* represent a "historical religious event," the celebration of which is a part of all of our religious or national heritage. On the contrary, it represents an event which Christians believe to be historical, but which non-adherents to that faith simply do not accept—*i.e.*, the birth of Jesus as the Son of God.[25] Deeming a representation of such event as historical is akin to making such a claim about a depiction of the parting of the Red Sea. Jews, as well as Christians, may believe that such an event took place, but others almost certainly do not.

Moreover, as Justice Brennan pointed out in his dissent in *Lynch* (joined by Justices Marshall, Blackmun and Stevens):

> When government decides to recognize Christmas Day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from preholiday activities.

465 U.S. at 710.

[24] *See also* 465 U.S. at 686. (referring to a "host of other forms of taking official note of Christmas, and of our religious heritage").

[25] We agree with the sentiment expressed by Justice Brennan that "for those who do not share these beliefs, the symbolic reenactment of the birth of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith." *Lynch*, 465 U.S. at 708 (Brennan, J., dissenting).



Not all Americans celebrate Christmas, however. Yet, each December, millions of Americans are made unwilling participants in that event. In public schools around the country, for example, non-Christian children find they often must take part in plays, songs and games that celebrate religious beliefs alien to their own faith, or separate themselves from their classmates and their teachers by refusing to share in the festivities. "To be so excluded on religious grounds by one's elected government is an insult and an injury that [should] not be countenanced by the Establishment Clause." 465 U.S. at 709 (Brennan, J., dissenting). This dilemma causes the Court today to find itself in the unusual position of having to consider arguments by varying factions of religious groups concerning the religious significance of the symbol of one of their holidays.[26]

The solution to this problem, and to the criticism of the view taken by the four circuit courts of appeal to have considered these issues since *Lynch*, and advanced by the respondents and *amici* herein—that this Court must consider each case individually and, with respect to the instant one, distinguish it from *Lynch*—is, we respectfully submit, that the Court reexamine the *Lynch* decision in light of these difficulties and set it aside. For , as stated by Justice Jackson concurring in *McCollum* v. *Board of Education*, 333 U.S. at 238, "[i]f with no surer legal guidance [than its own presuppositions the Court is] to take up and decide every variation of this controversy . . . [the Court] is likely to have much business of the sort."

If, however, *amici* (and the substantial majority of the courts of appeal that have been called upon to interpret *Lynch*) have misinterpreted this Court's message therein, and if, rather than a case-specific analysis, a far broader permission for state utiliza-

[26] Many Christians, for example, strongly object to denuding Christmas—one of the holiest days of the Christian calendar—of its religious significance. Christmas, after all, celebrates the birth of Jesus, whom Christians regard as the Son of God, and the holiday is to be regarded as far more than simply the basis for the busiest retail season of the year.

Similarly, many Jews would strongly object to the secularization of the menorah, a religious symbol, which is Chabad's position in this case. That position, however, was entirely compelled by this Court's decision in *Lynch*, *i.e.*, Chabad apparently felt no alternative, given that decision, other than to attempt to "secularize" its own holiday and that holiday's religious symbol.

tion of religious symbols and themes was intended, *amici* respectfully submit that *Lynch* is fraught with danger.

As discussed above, *Lynch* may, to our mind, be confined, first, to the Christmas season, and, second, to the specific context in which any religious symbols used are found within a holiday display. *See, supra,* at 8-14. Read broadly, though, *Lynch* could be said to justify the government's display and use of any religious symbol (perhaps even a crucifix, at least if adorned by secular trappings) so long as that use falls within the context of a particular holiday season, Easter for example, where the crucifix could be accompanied by Easter bunnies, egg hunts, parades and the like.[27] Such a view of *Lynch*, we submit, would clearly be at variance with this Court's Establishment Clause jurisprudence—but also illustrates the difficulties presented by *Lynch*.

Prior to *Lynch*, this Court had, time and time again, recognized that religion plays an important role in American history, as well as in current society, and acknowledge that the principle of separation of church and state cannot mean that there is no relation between the institutions of each. *See Bowen* v. *Kendrick*, ___ U.S.___, 108 S.Ct. 2562 (1988) (allowing religious organizations to participate in state-funded counselling programs); *Zorach* v. *Clauson*, 343 U.S. 306 (allowing public school students to be released from school for religious instruction). However, until *Lynch*, the mixture of public and religious functioning was, in essence, non-denominational. Nor, in *Zorach*, did this Court say that students of only one particular religion could be released from school for special instruction; rather, the decision was "religion-neutral."[28] *See generally Abington* v. *Schempp*, 374 U.S. at 303-04 (Brennan, J., concurring) (references to some "generic" God may be acceptable because, over time, they have lost their religious significance). In *Lynch*, however, this Court sanctioned government use of a distinctly sectarian symbol, the creche. This use of a sacred symbol, with, at the very least, government authorization, if not whole-hearted endorsement, strikes a blow at the heart of First Amendment protections. That some may believe that a member of one religion (particularly a minority one), or, for that matter, an atheist,[29] may feel only slightly diminished by government sanction of the use of another religion's symbols (particularly that of a majority one) is no justification for that result. This Court has never deviated from the principle that:

> it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all to soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on

[27] In *ACLU* v. *City of St. Charles*, the Seventh Circuit Court of Appeals, in post-*Lynch* decision, while enjoining the display of a Latin cross on a government building during the Christmas season, did so because the cross was not a traditional part of Christmas symbology. 794 F.2d at 271-72. The cross and, more specifically, the crucifix are, however, intimately associated with Easter observances.

[28] Similarly, that particular religious events and themes surface in public school history and literature classes is by no means inappropriate, so long as they are discussed in a secular context. *See Edwards* v. *Aguillard*, 482 U.S. at __, 107 S. Ct. at 2590 (Powell, J., concurring) ("In fact, since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events.... The Establishment Clause is properly understood to prohibit the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief.")

[29] Although at times forgotten, this Court recently reaffirmed the principle that government should not only not prefer one religious sect over another, but that it should not foster belief in religion over non-belief:

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the cubicle of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.

*Wallace* v. *Jaffree*, 472 U.S. at 52-53 (footnotes omitted).

our liberties.' Memorial and Remonstrance Against Religious Assessments, quoted in Everson, *supra*, 330 U.S., at 65,67 S.Ct., at 536, 91 L. Ed. 711.

*Abington* v. *Schempp*, 374 U.S. at 225. *Cf. Wallace* v. *Jaffree*, 472 U.S. at 60-61 ("The importance of that principle [no official preference for any religious denomination] does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is whether the government intends to convey a message of endorsement or disapproval of religion").

Nor is it significant that the symbols used or contemplated herein—the Christmas creche and, quite possibly, the Easter crucifix—are "passive." (*See* argument of City, City Br. at 21). This Court has never indicated that, to find an Establishment Clause violation, some showing of direct governmental compulsion, or the requiring of some affirmative act, is necessary. In fact, in *Wallace* v. *Jaffree, supra*, a post-*Lynch* decision, this Court acknowledged with approval its prior sentiment that " '[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' " 472 U.S. at 60 n.51, *citing with approval, Engel* v. *Vitale*, 370 U.S. 421, 431 (1962). Particularly where, as here, the two religions sought to be represented by the state—Christianity and Judaism—are the more "established" ones in the Pittsburgh community, this Court should be vigilant in protecting the sensibilities and sensitivities of non-believers in the Judeo-Christian tradition or, for that matter, of any religious creed.[30]

[30] As previously recognized by the Court, "[t]here are persons in every community—often deeply devout—to whom any version of the Judaeo-Christian Bible is offensive." *Abington* v. *Schempp*, 374 U.S. at 283 (Brennan, J., concurring).



## CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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